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Paper No. 27
EJS

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Kabbalah Centre International, Incorporated,
assignee of Research Centre of Kabbalah

Serial No. 75/376,580

Peter E. Nussbaum of Wolff & Samson, P.A. for Kabbalah
Centre International, Incorporated, assignee of Research
Centre of Kabbalah

Kimberly Krehely, Senior Trademark Attorney, Law Office 107
(Thomas Lamone, Managing Attorney)

Before Seeherman, Quinn and Bottorff, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Kabbalah Centre International, Inc., assignee of the
original applicant, Research Centre of Kabbalah, has
appealed the final refusal of the Trademark Examining
Attorney to register KABBALAH CENTRE for "educational
services, namely, providing seminars and courses in

religion and spirituality.”¹ Applicant seeks registration pursuant to the provisions of Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f).

Registration has been refused pursuant to Sections 1, 2, 3 and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052, 1053 and 1127, on the ground that the applied-for term is incapable of identifying applicant’s services because it is generic. The Examining Attorney has also asserted that, even if THE KABBALAH CENTRE were found not to be generic, it is descriptive and applicant has not shown that it has acquired distinctiveness as a trademark.

The appeal has been fully briefed; an oral hearing was not requested.

Much of the evidence and many of the arguments submitted in this case are identical and/or very similar to those in the appeal involving the requirement for a disclaimer of THE KABBALAH CENTRE in **In re Kabbalah Centre International Incorporated**, Serial No. 75/376,822 (TTAB July 30, 2001). Accordingly, much of this opinion will repeat the comments made in the previous decision.

¹ Application Serial No. 75.376,580, filed October 21, 1997, and asserting first use and first use in commerce on January 30, 1991.

Preliminarily, we turn to objections raised by the Examining Attorney and applicant. The Examining Attorney has objected to the declaration of Peter Nussbaum attached to applicant's appeal brief, by which applicant attempts to present additional evidence in the form of three exhibits. The Examining Attorney also objects to the Board's consideration of a new argument and case citation made in applicant's brief which was not presented to the Examining Attorney during examination.

With respect to the additional evidence, the first exhibit is a copy of the assignment information regarding the application. Such information is not considered new evidence, and may be submitted at any time. Indeed, the Office encourages the filing of such information. See Rule 3.85, "The certificate of registration may be issued to the assignee of the applicant ... provided that the party files a written request in the trademark application by the time the application is being prepared for issuance of the certificate of registration..." See also TBMP § 502.01.

The remaining exhibits are two registrations for the mark THE KABBALAH CENTRE and lion design (the same mark applied for in Application Serial No. 75/376,822) for goods rather than services, which issued pursuant to Section 2(f) on January 2, 2001, and an e-mail message to Mr. Nussbaum

from Lisa Kessler dated March 8, 2001 and reporting "numbers for the website" for February. Applicant explains that it submitted these documents with its brief because they were not available at the time applicant's appeal was filed.

Trademark Rule 2.142(d) provides that the record in the application should be complete prior to the filing of an appeal and that, after an appeal is filed, if the applicant wishes to introduce additional evidence, it may request the Board to suspend the appeal and to remand the application for further examination. Applicant did not follow the proper course, and we agree with the Examining Attorney that it would not be appropriate to consider this material now, at a point at which the Examining Attorney has no opportunity to submit evidence in response. Accordingly, Exhibits 2 and 3 have not been considered.

We should also point out that even if the material had been properly made of record, it would not change our decision herein. The registrations are for audio and video tapes and for non-fiction books and newsletters and magazines featuring or in the field of religion and spirituality, and are specifically different from the services identified in the present application. As for the e-mail, aside from the fact that it is so cryptic that the

information is unclear--e.g., it lists "Hits" and "Visits," but does not indicate the difference between them, and there is no indication as to what the references to "239,926 Pages" and "24,218 Unique Hosts" mean--there is no authentication of the information. Mr. Nussbaum merely states, in his declaration, that it is a true copy of a portion of an e-mail correspondence he received from an employee of applicant, but he has not made any statement as to the accuracy of the information contained in the e-mail.

As for the Examining Attorney's objection to the so-called new argument raised by applicant in its brief, and its citation of a case not cited during prosecution, that objection is overruled. Trademark Rule 2.142(d) refers to evidence in a case, not to argument or case citations.

In its reply brief, applicant, responding to the Examining Attorney's objection about the newly raised argument, asserts in a footnote that the Examining Attorney has presented new arguments, new evidence and a new ground for refusal, and requests that the Board "exclude these materials." We find that the Examining Attorney has not raised a new ground for refusal, but has merely augmented her argument regarding the genericness claim with her reference to de facto secondary meaning. Further, for the reasons stated above with respect to the Examining

Attorney's objections to a newly-raised argument, applicant's objections are not well taken. Finally, with respect to applicant's assertion that the Examining Attorney has submitted new evidence, no such evidence was submitted with her brief. To the extent that the Examining Attorney, in her brief, made certain statements of fact, the probative value of those statements will depend on the supporting evidence which is of record.

We turn first to the Examining Attorney's assertion that the applied-for term THE KABBALAH CENTRE is generic for applicant's identified "educational services, namely, providing seminars and courses on religion and spirituality." In support of this claim, the Examining Attorney has submitted definitions of the words "Kabbalah," "centre" and "center," as well as articles or excerpts of articles taken from the NEXIS data base, an article from "USA Today," and an excerpt from a book by Adin Steinsalz, all of which include references to the word "kabbalah."

The dictionary definitions are as follows:

Kabbalah

The 'received tradition' of Jewish mysticism, particularly those forms of mystical teachings which were developed in the middle ages in south-west Europe, and later on in the Galilean city of Safed in Palestine. The main text of the Kabbalah is the Zohar, written down in 13th century Spain.

Unlike esoteric Judaism the Kabbalah teaches that the creation of the world took place through a series of emanations from the Godhead or *Ein Sof*. These emanatory structures, the 10 *sefirot* are the inner constitution of all reality as well as of the divine manifestation. They represent a finely balanced harmony enabling the flow of divine energy to sustain humanity and nature. Human sins affect this harmony, disturbing it and allowing the potential for evil within it to become active. The Kabbalah reinterprets all the main beliefs and rituals of Judaism in terms of its esoteric theology, which has pantheistic overtones. Its powerful images appealed to mystics and nonmystics alike. The most important development of Zoharic ideas was the Kabbalah of Isaac Luria (1534-72), which introduced a strong messianic element, and led to messianic movements of a mystical type. [Internal citations omitted]²

cabala or cabbala also kabala or kabbala

1. Often Cabala. A body of mystical teachings of rabbinical origin, often based on an esoteric interpretation of the Hebrew Scriptures.
2. A secret doctrine resembling these teachings.

centre
Variant of center.

center
5.a. A place where a particular activity or service is concentrated: a *medical center* b. A point of origin, as of influence, ideas, or actions: a *center of power*; a *center of unrest*. C.

² A New Dictionary of Religions, rev. ed. © 1995.

An area of dense population: a
metropolitan center.³

The following statements come from the various
periodical excerpts:

Headline: Kabbalah for the Masses;
Judaic teachings turn mainstream

USA Today has even proclaimed that
Buddhism is out, and Kabbalah is in.

"Kabbalah is a wisdom not a religion,
so it doesn't matter what religion you
consider yourself," said Merlin, who
was raised Episcopalian.

"Sun-Sentinel" (Fort Lauderdale, FL),
March 15, 1998

Some Jewish singles are into the study
of Kabbalah Jewish mysticism a hot
trend and new way to meet. [sic]
"Daily News" (New York), February 11,
1998

Headline: Mysticism Craze of Celebs
Wends Way to Wilmette

Even so, Kabbalah in the Midwest has
flourished in relative obscurity,
studied mostly by serious scholars of
religion and philosophy. Entire
careers are spent poring over the main
text of the Kabbalah, a 2,000-year-old
tome also called the Zohar, or The Book
of Splendor.

"Chicago Tribune," April 5, 1998

Headline: Celebs embrace Jewish
mysticism

The New Standard Jewish Encyclopedia
says Kabbalah is "The mystical
religious stream in Judaism .. (that)

³ The latter three definitions are taken from The American Heritage Dictionary of the English Language, 3d ed. © 1992.

seeks to explain the connection between God and creation, the existence of good and evil, and to show the road to spiritual perfection." It was shrouded in mystery for centuries; now those of every faith attend classes worldwide. "USA Today," September 20, 1996

There is no question that THE KABBALAH CENTRE is descriptive of applicant's educational services of providing seminars and courses on religion and spirituality. Applicant has stated that its educational and religious services "relate to the study of jewish mysticism and spirituality, referred to by some as 'cabalistic study' or as set forth in the dictionary definition attached to the office action, as 'cabala', 'cabbala', 'kabala' or 'kabbala.'" Response filed August 16, 1999. Indeed, applicant has acknowledged the descriptiveness of THE KABBALAH CENTRE by its claim of Section 2(f) acquired distinctiveness.

However, the issue before us is not whether THE KABBALAH CENTRE is merely descriptive, but whether it is generic. To prove that a mark is generic, the Office may not simply cite definitions and generic uses of the constituent terms of a mark, but must consider the meaning of the disputed phrase as a whole. **In re Dial-A-Mattress Operating Corporation**, 240 F.3d 1341, 57 USPQ2d 1807 (Fed.

Cir. 2001); **In re The Am. Fertility Soc'y**, 188 F.3d 1341, 51 USPQ2d 1832(Fed. Cir. 1999).

Thus, we turn to the evidence showing use of the entire term "the kabbalah centre" or its equivalent spelling, "the kabbalah center." The Examining Attorney asserts that there are five pieces of evidence showing generic usage of the term "the Kabbalah center." We will examine each of them.

The article in the September 1, 1999 issue of "Tikkun" magazine includes the phrase "Kabbalah centers" in quotes, as follows:

Differing from the interest in Hasidism that centered mostly around Chabad in the preceding decades, this turn to Kabbalah has rather little to do with Jewish observance nor with nostalgia for a romanticized shtetl past (a past that many denizens of "Kabbalah centers" in fact do not share).

The fact that the author placed the words "Kabbalah centers" in quotes indicates that this is an unusual phrase, and would not be regarded as a generic term.

The remaining four pieces of evidence cited by the Examining Attorney relate to a single article, written by Rachel Graves for the Associated Press. This article was published in the "Calgary Herald" and in "The Commercial Appeal" (Memphis, Tennessee). (The articles differ in that

the Calgary paper uses the British spelling of "centre," while the Memphis paper spells it in the American fashion, "center.") Portions of the article follow:

Chambers, who was raised a Roman Catholic, is director of the Karin Kabbalah Center in Atlanta, whose members practice a once-secret aspect of Judaism called Kabbalah. Students pray and practice meditation as the route to self-understanding.

Kabbalah was popular in Europe in the Middle Ages, when it was passed on to Jewish men over 40 who were deemed to have the maturity and pristine spirituality to handle mysticism's power.

Its followers claim that, through studying Jewish texts and achieving a more intimate relationship with God, Kabbalists can understand the hidden meaning of the Torah and can call on God to alter nature on their behalf.

Today, Kabbalah centers are popping up throughout the United States, teaching a hybrid version of this Jewish mysticism with no restrictions on age, gender or religion. Orthodox Jews dismiss the trend as a New Age fraud.

At the Atlanta center, the mostly Christian members will celebrate Hanukkah—lighting candles and saying Jewish prayers—in conjunction with their Christmas Eve service, which also incorporates meditation and faith healing.

Rabbi Irving Greenberg, president of the Jewish Life Network in New York, said some of the centers are nothing but New Age imitations of Kabbalah.

"People knock off Gucci and Armani because they're in," he says.

The Examining Attorney asserts that the owner of the Karin Kabbalah Center is using "Kabbalah Center" as a generic identifier in its trade name, and does not recognize any trademark significance in the term. The Examining Attorney also points to the article's author's use of "Kabbalah centers" in a generic fashion in the paragraph beginning with the word "Today." Further the Examining Attorney says that Rabbi Greenberg is quoted in the article as saying "some of the centers are nothing but New Age imitations of Kabbalah," and from this she concludes that "this implies 'Kabbalah center' is a generic term and that Rabbi Greenberg is referring to other Kabbalah centres in addition to those named in the article." Brief, p. 6.

There are certain problems with the conclusions the Examining Attorney draws from the articles. First, the quote from Rabbi Greenberg does not refer to "the centers." That language was used by the reporter. Nor, in view of the statements by the Federal Circuit in Dial-A-Mattress and American Fertility, could we conclude that even a reference to "centers" would be evidence of generic usage of the phrase KABBALAH CENTRE.

Second, the reference to the Karin Kabbalah Center is not evidence that "the owner of the Karin Kabbalah Centre is using 'Kabbalah Centre' as a generic identifier within their tradename [sic]." Brief, p. 5. A newspaper article is not evidence of the statements made therein, and therefore is not evidence that there is a Karin Kabbalah Center in Atlanta.⁴ Even assuming that there is a Karin Kabbalah Center in existence, the fact that its name includes the phrase "Kabbalah Center" does not necessarily show that "kabbalah center" is a generic identifier, or that the owner of that trade name regards it as such. As used in the article, the entire phrase "Karin Kabbalah Center" appears as a trademark or trade name.

Although a newspaper article is not evidence of the information contained therein, it can be used to show that the public has been exposed to the statements made in the article, such that if a term is used generically it is possible to conclude that the public has come to view the term as generic. In this case, however, we cannot deem the public to have been exposed to the article which appeared in the Canadian newspaper. Thus, only the article which

⁴ The hearsay problem which results in attempting to use a newspaper article to prove the truth of the statements made in the article is readily apparent in this case, with the different spellings of the name Karin Kabbalah Centre/Center in otherwise identical articles.

appeared in the Memphis newspaper can be deemed to have been exposed to consumers in the United States.

We agree with the Examining Attorney that the author of the Memphis article used "kabbalah center" in a generic fashion in the "Today" paragraph, and that her other reference to "the centers" in connection with the Rabbi Greenberg quote indicate the author's belief that this is a generic term.

However, we cannot consider this generic usage in just one article appearing in a Memphis newspaper to be sufficient to prove that the public understands THE KABBALAH CENTRE to be a generic term for the educational services identified in applicant's application. See **In re Merrill Lynch, Pierce, Fenner and Smith, Inc.**, 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987). We hasten to add, though, that on a different record, such as might be adduced by a competitor in an opposition proceeding, we might arrive at a different result. However, on the record before us, and given that genericness must be shown by clear evidence, we cannot conclude that THE KABBALAH CENTRE is generic.

Having found that the Office has not met its burden in proving that THE KABBALAH CENTRE is a generic term, we turn to a consideration of whether applicant has met its burden

of proving that the mark has acquired distinctiveness for "educational services, namely, providing seminars and courses on religion and spirituality."

Applicant has submitted the declaration of Karen S. Berg, the Secretary of Research Centre of Kabbalah, the original applicant. The declaration includes the following statements:

Applicant employs approximately 500 staff members, has 15 permanent branches worldwide (7 of which are located in the United States, and has an additional 25 satellite facilities throughout the world (including 13 located in the United States);⁵

Applicant distributes throughout the United States and elsewhere throughout the world numerous promotional, marketing and advertising materials in connection with its educational and religious services;

Applicant has fulfilled its mission by providing education and information through classes, lectures, meetings, and the dissemination of information through books, magazines, brochures, newspapers, video tapes, audio tapes and the Internet to millions of people in the United States and abroad;

⁵ In a footnote in its appeal brief applicant states that these figures reflect the situation at the time the Berg declaration was signed on December 28, 1998, and that today applicant has 21 permanent branches worldwide, of which 10 are located in the United States, and 31 satellite facilities, of which 16 are located in the United States. This information was not properly made of record, and has not been considered; in any event, it would not change our decision herein.

Applicant has conducted annual advertising campaigns continuously for at least the past decade and has expended substantial sums of money publishing advertisements in national publications such as The New York Times, The Los Angeles Times, The Jewish Journal, The Chicago Tribune and many others;

Applicant has also expended substantial sums of money conducting local advertising campaigns in cities throughout the United States and elsewhere throughout the world;

Applicant has advertised its goods and services provided and sold under the mark THE KABBALAH CENTRE mark [sic] through direct mail campaigns that have reached millions of people.

In addition to Ms. Berg's declaration, applicant has shown that it has establishments in Las Vegas, Chicago and Philadelphia, that the first two establishments are listed on its website, and that a listing for a "Power of Kabbalah" lecture at applicant's Philadelphia location appeared on the website for the "Philadelphia citypaper." Applicant also owns a registration for THE KABBALAH CENTRE, issued under the provisions of Section 2(f), for a "series of non-fiction books in the field of religion and spirituality; newsletters and magazines in the field of

religion and spirituality.”⁶

As noted above, the burden is on the applicant to prove acquired distinctiveness. Moreover, the greater the degree of descriptiveness a term has, the heavier the burden to prove it has attained secondary meaning. **Yamaha International Corporation v Hoshino Gakki Co. Ltd.**, 840 F.2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988). In this case, the burden on applicant is a heavy one. KABBALAH is the name of the subject matter of applicant’s educational services, and the term THE KABBALAH CENTRE immediately tells consumers that applicant provides a place for the study of this subject. In fact, in the brochure submitted as a specimen in this application, applicant advertises a lecture

At 8:00 p.m. In
The Kabbalah Centre

followed by an address and telephone number, thus emphasizing that THE KABBALAH CENTRE is the name of the place where its services are rendered.

⁶ Registration No. 2,264,214.

We note that in its brief applicant states that, in connection with its Section 2(f) claim, it has provided, inter alia, affidavits of officers of applicant and data regarding the circulation and subscribers of applicant’s magazine. However, only the December 28, 1998 affidavit of Karen Berg has been made of record; further, the record in this application contains no evidence as to the circulation and subscribers of applicant’s magazine (or even any evidence as to how the mark may be used on the magazine).

After having reviewed the evidence of record, we find that applicant has not met its burden of proving that the highly descriptive term THE KABBALAH CENTRE has acquired distinctiveness. Ms. Berg's declaration, although it mentions various promotional efforts, does not distinguish between applicant's efforts in the United States and abroad. Obviously, applicant must demonstrate that its mark has acquired distinctiveness in the United States, and any distinctiveness the mark may have acquired in other parts of the world will not support a Section 2(f) claim. Moreover, the declaration is very vague as to the specifics of applicant's efforts. The statements are made that applicant has expended "substantial sums of money" in local and national advertising campaigns, but no actual advertising figures are provided, nor is there any indication of the numbers of any advertising materials distributed. Thus, we cannot ascertain from applicant's submissions whether its promotional efforts have been minimal or far-reaching.

Further, it is not clear whether applicant's advertising efforts are for its books and tapes or for its educational services, and it is not clear whether the mark THE KABBALAH CENTRE per se appears in its promotional materials. Looking at the "representative materials"

attached to Ms. Berg's declaration showing how applicant's mark is displayed, two are photocopies of audiotapes which bear the legend "© THE KABBALAH CENTRE" and two are photocopies of videotapes which bear the trademark THE KABBALAH CENTRE and lion design, with no reference to THE KABBALAH CENTRE per se. Obviously even if THE KABBALAH CENTRE were truly used as a mark on the audiotapes and videotapes, such use would not be evidence of the use of the mark in connection with the services at issue herein. The remaining "representative material" is photocopies of what may be a brochure, although it is not perfectly clear to us what it is. In this material, the mark THE KABBALAH CENTRE and lion design is featured, but the words THE KABBALAH CENTRE are shown only as part of the phrase "The Kabbalah Centre Vision: To reveal the Light of the Creator of the world so every person can achieve complete fulfillment." On the same page there is a reference to "The Kabbalah Learning Centre" as part of the sentence "The Kabbalah Learning Centre endeavors in every thought, word and deed to provide the wisdom of Kabbalah in the most understandable of formats..."

Certainly if the examples which applicant has submitted of its use of THE KABBALAH CENTRE are representative of its promotional and marketing efforts,

they are insufficient to show that the public has come to recognize THE KABBALAH CENTRE per se as a mark for its "educational services, namely, providing seminars and courses on religion and spirituality."

As for applicant's registration for THE KABBALAH CENTRE which registered under Section 2(f), that registration is for books, newsletters and magazines, and these goods are sufficiently different from the services identified in this application that it cannot show that THE KABBALAH CENTRE has acquired distinctiveness for applicant's services. Cf. **In re Dial-A-Mattress Operating Corp.**, supra.

Decision: Although we find that THE KABBALAH CENTRE is not generic for applicant's identified services, the refusal of registration on the ground that the mark is merely descriptive, and has not been shown to have acquired distinctiveness, is affirmed.⁷

⁷ It is noted that at one point during prosecution applicant requested, as an alternative to registration on the Principal Register, registration on the Supplemental Register. The Examining Attorney refused registration on the Supplemental Register on the basis that the applied-for term was incapable of identifying applicant's services and distinguishing them from others, essentially because the Examining Attorney found that the term was a generic name for the services. In its response to that Office action applicant stated that it did not wish to pursue registration of the mark on the Supplemental Register, "but instead desires to proceed with its appeal of the refusal to register the mark on the Principal Register." In the following Office action the Examining Attorney treated the alternative amendment to the Supplemental Register as having been withdrawn.

In view thereof, the issue of the registrability of the mark on the Supplemental Register is not part of this appeal. Should applicant wish to obtain a Supplemental Registration, applicant is advised that an application which has been considered and decided on appeal, as this one has, will not be reopened except for the entry of a disclaimer or upon order of the Commissioner. See Trademark Rule 2.146(g). Accordingly, applicant's recourse, if it wishes to reopen the application for further consideration of the amendment to the Supplemental Register, is to file a petition to the Commissioner. This statement should not be read as indicating that any such petition will be granted.